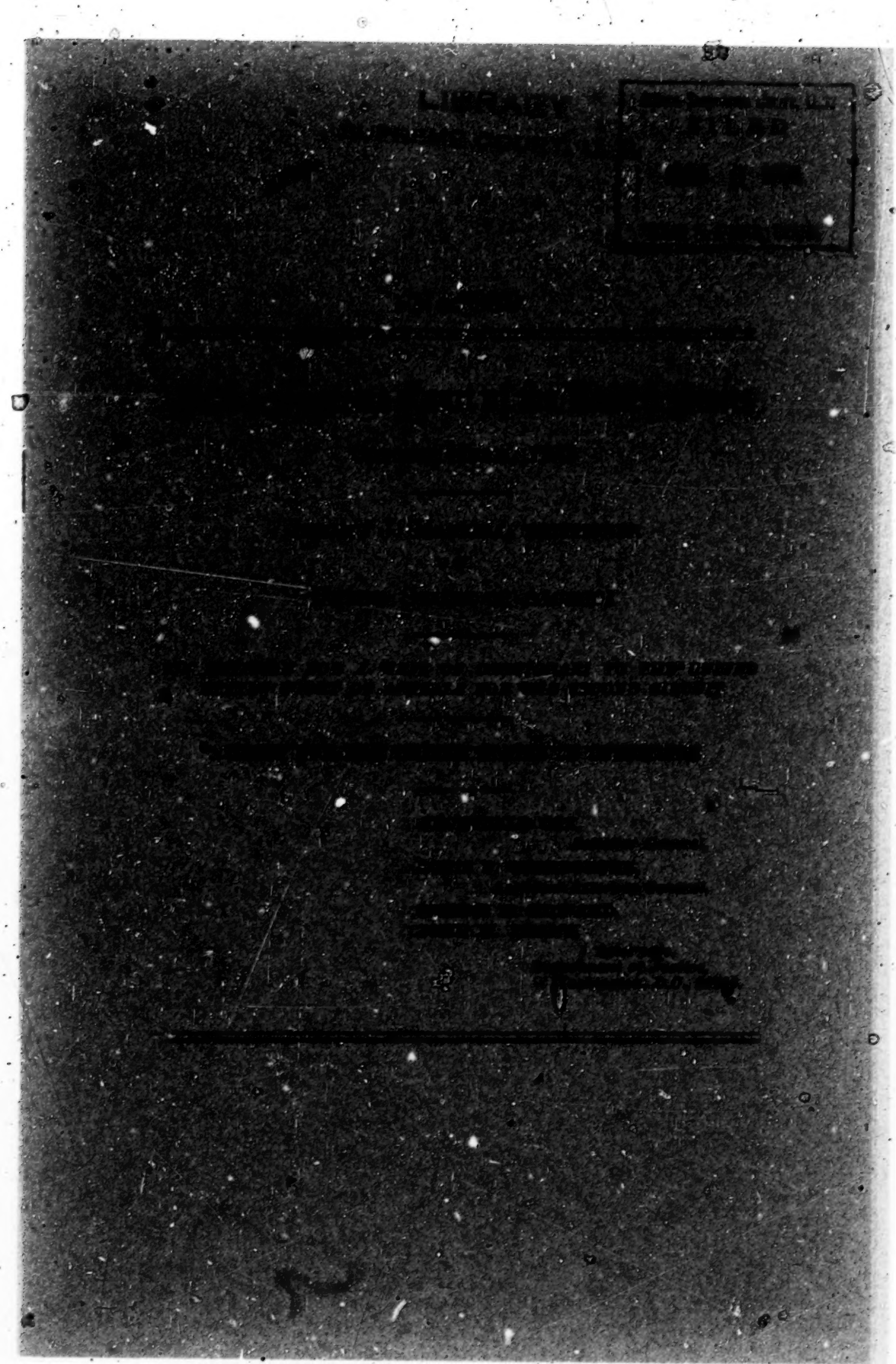

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Bull v. *United States*, 295 U.S. 247	8
Nicol v. *Ames*, 173 U.S. 509	8

Statute:

18 U.S.C. 371	2

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 989

JEROME J. HASKELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's memorandum (R. 149a–168a),[1] denying petitioner's motion to set aside the verdict, is reported at 217 F. Supp. 534. The opinion of the court of appeals (Pet. 1a–11a) is reported at 327 F. 2d 281.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1964 (Pet. 1a) and the petition for rehearing denied on February 19, 1964. On March 9, 1964, Mr. Justice Harlan extended the time within

[1] "R." and "Supp. R." refer to petitioner's and the government's appendix in the court of appeals, respectively.

which to file a petition for a writ of certiorari to and including April 18, 1964. The petition was filed on April 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by questions asked him on cross-examination which erroneously suggested that he had been convicted of grand larceny when the trial court twice explicitly told the jury that petitioner had actually been convicted only of petit larceny.

2. Whether petitioner was denied a fair trial by general observations made by the trial judge in his instructions to the jury concerning the seriousness of the crime of tax evasion.

STATEMENT

Petitioner and one Vincent Anthony were indicted in one count under the general conspiracy statute, 18 U.S.C. 371, for conspiring together and with persons unknown to evade and defeat the federal income taxes owed by them and by a certain corporation for the fiscal years ending September 30, 1955, and September 30, 1956 (R. 12a–14a). Petitioner was convicted after a jury trial. (Anthony had previously entered a plea of *nolo contendere*) and, on appeal, the court below affirmed (R. 3a, 7a, 148a; Pet. 11a).

Petitioner testified in his own defense. On direct examination, his counsel asked him if he had been convicted of petit larceny in 1934 or 1935. Petitioner answered in the affirmative and testified further that

he had subsequently been convicted of no other crime except for speeding (Supp. R. 66a). On cross-examination, the prosecutor asked petitioner whether the conviction was not for grand larceny rather than petit larceny and petitioner answered in the negative (R. 27a). After an interruption caused by an objection, the prosecutor asked whether on August 26, 1942, petitioner was convicted of grand larceny in the State of New York, and petitioner answered, "I was not" (R. 29a). The court then sustained an objection to the prosecutor's offer of an F.B.I. report which indicated that petitioner had been convicted of grand larceny (R. 30a, 156a), but denied a motion for a mistrial (R. 30a). The next day petitioner, still under cross-examination, testified that he had been convicted of petit larceny but he was not sure as to the year when this occurred (R. 42a).

Later that day after the noon recess and before the jury was brought in, the prosecutor told the court that, in view of petitioner's testimony at the morning session, he had asked the F.B.I. to verify the F.B.I. report of a grand larceny conviction, on which he had relied. The F.B.I. replied that the report was erroneous, petitioner having been indicted for grand larceny but having been convicted only of petit larceny (in 1942) on his plea of guilty to the latter offense (R. 43a–44a). Therefore, the prosecutor requested the court to instruct the jury to disregard the question referring to grand larceny and to inform it that the government conceded that the conviction was only for petit larceny (R. 44a). Peti-

tioner's counsel refused to consent to this procedure, claiming incurable prejudice and moving for a mistrial (R. 44a, 49a–52a). The court denied the motion (R. 51a). The jury then returned to the court room and the court gave the following instruction (R. 53a–54a):

> The COURT: I would like to say to the jury very briefly two things with respect to certain testimony that was given this morning on the subject of Mr. Haskell's alleged criminal record.
>
> Number one, I instruct the jury totally to disregard any reference to a conviction for grand larceny. As I recall the evidence, in short, on that, was that Mr. Haskell denied that he had ever been convicted of grand larceny.
>
> Government counsel have informed the Court right after the noon recess, and before you ladies and gentlemen came in, that on the Government's check this morning—or, this noontime—after this matter was raised, it has disclosed that Mr. Haskell was not convicted of grand larceny in August of 1942, which is the date referred to in the Government's question.
>
> Rather, according to information by the Government, which will be subject to verification by the Government before this case is closed, the record shows that on or about that time, August, 1942, Mr. Haskell pleaded guilty to a charge of petty larceny. So, without elaborating on this subject any further, I will ask each of you ladies and gentlemen to totally wipe the slate clean, so far as Mr. Haskell is concerned with respect to any reference, even in the Government's question, to a charge of grand larceny.

> What it amounts to, in short, is: The Government, having confirmed the correctness of Mr. Haskell's answer when he denied that he'd been convicted of grand larceny, and the Government, having brought that to my attention as promptly as Mr. Zampano was informed about it, I now bring it to your attention, and ask you to be scrupulously careful to disregard any reference to a conviction of grand larceny. It is not so.

Later, a stipulation concerning the conviction for petit larceny was read to the jury (R. 58a).

On the following day (R. 59a), the court delivered its charge to the jury and, as requested by petitioner's counsel (R. 131a–132a), instructed it as follows (R. 134a):

> Number two, I inadvertently omitted to instruct you when I charged you with respect to the stipulation entered into by counsel yesterday regarding Mr. Haskell's prior criminal record. As you will recall, I believe this stipulation was dictated on the record by Mr. Erdheim [petitioner's counsel] and read to you. It is, in substance, this: That the only conviction of record against Mr. Haskell is for a misdemeanor, petty larceny, in August, 1942.
>
> Aside from that misdemeanor, he has no criminal record whatsoever, and I so charge you.

After the jury rendered its verdict, petitioner moved for acquittal or a new trial on the ground, *inter alia*, of prejudice allegedly arising from the question concerning a conviction for grand larceny (R. 146a). The court denied the motion (R. 150a)

and recited at length, in a memorandum, all the relevant circumstances (R. 154a–167a). The court quoted from the record to show that the prosecutor informed petitioner's counsel, about a week before the trial, that the government had information that petitioner had committed grand larceny, and that his counsel thereafter explored the problem and concluded that there was no such conviction but never informed the prosecutor (R. 155a–156a). The court concluded that the prosecutor had acted entirely in good faith on the basis of an erroneous F.B.I. report and that, in any event, the petitioner suffered no prejudice (R. 164a–167a).

In its charge to the jury (R. 60a–122a) the court first made certain general observations concerning the importance of the case (R. 61a–63a), explaining the necessity for a "vigorous, intelligent enforcement of the revenue laws" and the seriousness of the crime of tax evasion (R. 61a–62a) and, on the other hand, the importance of a fair trial, which the court said was a matter "of equally vital concern to all of us" (R. 62a–63a). Petitioner excepted to the language used by the court in describing the serious character of the offense (R. 123a). The court, acceding in part to the exception (R. 131a), instructed the jury to disregard its statement that "There is, in the language of the Supreme Court of the United States, no more serious crime than the crime of defeating or evading income taxes, or a conspiracy to do so" (R. 134a).

ARGUMENT

1. Petitioner's own counsel first introduced the subject of prior convictions, obtaining from petitioner the admission that he was once convicted of petit larceny (Supp. R. 66a). The prosecutor admittedly made a mistake in asking petitioner on cross-examination whether he had been convicted of grand larceny. After the petitioner had denied this, the prosecutor ascertained that the denial was correct and, on his own motion, brought this matter to the attention of the trial court. The court then twice instructed the jury that it should totally disregard the reference to a grand larceny conviction because petitioner's sole criminal record consisted of the conviction for petit larceny.

Petitioner is himself partially responsible for any possible prejudice since his counsel had been informed before trial that the government believed that petitioner had been convicted of grand larceny and counsel had ascertained that this was erroneous. Nonetheless, counsel did not inform the government of its error. Surely, in these circumstances, petitioner cannot rely on the mistake made by the government.

In any event, it clearly appears that petitioner suffered no prejudice. Any possible prejudice was swept away by the prosecutor's prompt admission that he was completely mistaken and by the court's

---

Apparently, this instruction was overly favorable to petitioner. The district court subsequently stated: "As later disclosed by defendant's pre-sentence report, this charge regarding defendant's criminal record was more favorable than the facts warranted" (R. 164a).

clear instructions to the jury. Petitioner, however, ignores the remedy afforded him and instead cites (Pet. 8–12) readily distinguishable cases where there was no retraction and no cure.

2. There is no merit to the contention (Pet. 13–15) that petitioner was prejudiced by the court's general observations on the gravity of the offense of tax evasion (R. 61a–62a). There can be no doubt that the court's statements were correct.[3] As this Court has observed, "The power to tax is the one great power upon which the whole national fabric is based" (*Nicol* v. *Ames,* 173 U.S. 509, 515), and "taxes are the life-blood of government, and their prompt and certain availability an imperious need" (*Bull* v. *United States,* 295 U.S. 247, 259).

The only question is whether there was any lack of fairness in the court's remarks. Clearly there was not, since the court immediately invited the jury to consider "the vital interests of the individual Haskell, as a defendant here on trial," and admonished them to give "not just lip service, but full impact, giving him the full benefit of the triumvirate of his basic rights," including the presumption of innocence and the requirement that the government "prove its case beyond a reasonable doubt" (R. 62a–63a). Thus, while the judge stated on the one hand that "to strike at or evade income taxes, is to strike at the jugular vein of our American system of government" (R.

[3] The trial court actually withdrew one of its statements on petitioner's objection and told the jury to disregard it (see p. 6 above).

61a), he also observed on the other that "If an enemy were to strike at our society, one of the very first things that would be stricken down would be the right to a jury trial" (R. 62a). As the court of appeals said (Pet. 9a):

> The judge was merely making some preliminary remarks to set the case in focus, as it were. All elements of the crime charged, burden of proof, and the manner of weighing evidence were later gone into in the most painstaking and thorough way. It is difficult to see how these few words could have inflamed the jury against the defendant.

In short, if the challenged observations are taken in the context of the entire charge, it is readily apparent that the claim of prejudice is without substance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1964